

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of the Protests of:)	
)	CASE NO. 2008-112
Smith Turf & Irrigation, LLC)	
)	POSTING DATE:
Re: Statewide Contract for Lawn &)	
Landscape Equipment)	AUGUST 22, 2008
<u>IFB NO. 08-S7683</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Smith Turf & Irrigation, LLC (Smith). The case arises from a protest of the awards resulting from Solicitation Number 08-S7683 issued on March 7, 2008. The solicitation was for a statewide contract for lawn and landscaping equipment. Smith protests the State's decision to declare its offers for line items 2, 4, 7, and 10 non-responsive because Smith did not submit with its bid letters from its manufacturers authorizing Smith to bid on their behalf, as required by the solicitation. Smith acknowledges that it did not include letters of authorization from its manufacturers, but contends that its omission should be treated as a minor informality and Smith should be allowed to cure the omission.

As the legal issues to be resolved are clear, this opinion is prepared based upon an administrative review of the procurement file without the benefit of a hearing.

NATURE OF THE PROTESTS

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The invitation for bids, issued March 7, 2008, sought various types of lawn and landscaping equipment for purchase by the agencies of the State as well as political subdivisions. The invitation sought bids in eleven different lots comprised of various types of equipment. These lots ranged from commercial lawn mowing equipment in lots 1 and 2 to various types of loaders and trailers in lots 10 and 11. Some of the lots, such as lot 5, were relatively limited in their scope (various types of chain saws) while others such

as lot 1 ranged from push type rotary mowers to "heavy duty" mowers. Included in the lots were items such as all types of mowers, sprayers, turf equipment, utility vehicles, tractors (both compact and utility) and safety equipment. Offers were permitted to be made on one or more of the eleven lots.

Bidding was limited to manufacturers or those specifically authorized by the respective manufacturers of the equipment being solicited. It was the intent of MMO that bidders offer a single percentage discount for all items within each lot which signified the percentage discount allowed off each manufacturer's published price for the particular item sought within the lot. A minimum ten percent discount was required to be eligible. Contracts would be awarded to all bidders who offered ten percent or more off their manufacturers' published prices. The discounts listed would not foreclose further negotiation by the purchasing agencies but would constitute guaranteed minimum discounts from the published prices of each manufacturer.

Prior to the issuance of the solicitation a pre-solicitation conference was conducted on January 22, 2008. After the Invitation for Bids was issued on March 7, 2008 a pre-bid conference was held on March 18, 2008. Smith was not represented at the pre-bid conference. An amendment to the IFB was issued on March 21, 2008 and the bid opening occurred on April 7, 2008. According to Mike Burgess of Smith, Smith submitted bids for sixteen products covered in lots 1, 2, 4, 7, and 10.¹ On April 16, 2008, the procurement manager, Cooper Marlowe, issued to Smith a determination of non-responsiveness with respect to its entire bid. Mr. Marlowe found Smith non-responsive on all lots writing "None of the bidder's offers herein are accompanied by any letters from manufacturers. Bidder is not a manufacturer and was not authorized by any manufacturer to bid on its behalf. Therefore, all offers herein are deemed to be non-responsive." [Determination of Non-Responsive Bid]

CONCLUSIONS OF LAW

The issue in this case is whether the bids submitted by Smith were properly rejected. Mr. Marlowe rejected Smith's bid as non-responsive. However, in this case, Smith's oversight was not a matter of

¹ Per an April 24, 2008 email to Cooper Marlowe of MMO.

responsiveness, but rather, responsibility of the bidder. The Code defines a responsible bidder as, "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(6)] In the solicitation, MMO required that, "Bids will only be accepted from manufacturers or dealers expressly authorized to bid on behalf of a manufacturer." With this requirement, MMO established a special standard of responsibility. See *Carter Chevrolet Agency, Inc.*, B-270962 (Comp. Gen. 1996) ("[T]he manufacturer's letter of commitment clause at issue in this protest constitutes a definitive responsibility criterion since it establishes a specific and objective standard to measure the offeror's ability to perform . . ."); *Software City*, B-217542 (Comp. Gen. 1985) (specification requiring each offeror of software to obtain a manufacturer's letter of commitment for each product offered guaranteeing the supply of the product to the offeror for the term of the contract is a definitive responsibility criterion). The regulations expressly authorize the use of special standards of responsibility, reading:

When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory. [19-445.2125(F)]

Because this matter regards responsibility, the procurement officer is not limited to considering information available at opening. Rather, the procurement officer may consider any information acquired prior to the time of award.

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable. [19-445.2125(B)]

Here, the solicitation expressly required an offeror, if offering as a dealer, to submit documentation proving that it is expressly authorized to bid on behalf of a manufacturer. It read, "Bids will only be accepted from manufacturers or dealers expressly authorized to bid on behalf of a manufacturer."

By his own admission, Mr. Burgess acknowledged that he did not submit authorization letters from the manufacturers in writing: "It was my mistake and oversight"² and "My failure to include these [sic] letters was my sole responsibility."³ As long as an offeror is given a reasonable opportunity to provide the required information, the law does not require that the procurement officer give an offeror another opportunity to submit such information. S.C. Code Ann. § 11-35-1810(2) ("The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror."); S.C. Code Ann. Regs. 19-445.2125(B) ("If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable."). The law does not prohibit, but also does not require, the procurement officer to go back to an offeror and request the same or additional information. S.C. Code Ann. Regs. 19-445.2125(B) ("At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor."), 19-445.2125(D) ("The determination [of responsibility] is not limited to circumstances existing at the time of opening.").

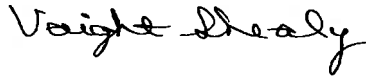
In this case, the procurement officer is entitled to base his determination upon the information available (provided Smith's failure to provide the information was unreasonable), find Smith non-responsible for failure to provide such information, or request Smith to provide the information. Because Mr. Marlowe determined Smith non-responsive, rather than non-responsible, it appears Mr. Marlowe did not actually exercise his discretion in this matter.

² Per an April 25, 2008, email to Mr. Cooper.

³ Per an April 27, 2008 email to Allen Register.

DETERMINATION

The procurement officer rejected Smith as non-responsive. However, the letters requested by the solicitation were needed to determine Smith's responsibility, not its responsiveness. Accordingly, the procurement officer had the discretion to either provide Smith another opportunity to provide the information needed, determine Smith non-responsive for its unreasonable failure to provide the required information (if the failure was unreasonable), or determine Smith's responsibility on the information available. Because this discretion was not exercised, the procurement is remanded back to the procurement officer. The procurement officer is instructed to exercise his discretion in this matter in good faith and in a manner consistent with the best interests of the state.⁴



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

August 22, 2008

Date

Columbia, S.C.

⁴ Remanding the matter to the procurement officer should not infer any suggestion or direction by the CPO to the procurement officer what determination should be made. In fact, Smith, as were all bidders, was afforded ample opportunity to submit letters from its manufacturers. The procurement officer issued his IFB on March 7, 2008 requesting bids be submitted by April 7, 2008, one month later. The original solicitation required that any dealer bidding on a manufacturer's behalf must submit a letter from that manufacturer authorizing the bid. Smith submitted bids on 14 items, but submitted no letters from any manufacturers with its bid. Now, after prices and his competition has been revealed, Smith asks to submit letters from manufacturers supporting his bids for only 5 products lines, not all 14 of the product lines bid.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Martin, Deb

From: Protest-MMO
Sent: Wednesday, April 30, 2008 1:32 PM
To: _MMO - Procurement; Shealy, Voight
Subject: FW: SC protest letter
Attachments: First Sole Source letter.doc; PTE South Carolina State Bid Memo.doc; dakota smith turf sole source letter.doc; TORO Sole Source Letter South Carolina.pdf; Rayco Distributor.doc

From: Mike Burgess[SMTP:MIKE.BURGESS@SMITHTURF.COM]
Sent: Wednesday, April 30, 2008 1:30:56 PM
To: Protest-MMO
Subject: SC protest letter
Auto forwarded by a Rule

Dear Sirs:

Please regard this as a formal protest by Smith Turf Inc. (STI) of solicitation #S7683, Lawn and Landscape Equipment. Specifically, we are protesting line items 2, 4, 7 and 10. It is not our intent to challenge the award to other vendors, we are asking for an additional award to Smith Turf Inc.

It is our understanding that the State's intent is to not award a contract to STI due to a lack of Authorization Letter from the manufacturers – Toro, Dakota, Progressive, Rayco and First Products. We would like the State to regard this as a Minor Informality as STI is the exclusive supplier of Toro Commercial Division products, Dakota, Progressive, Rayco and First Products in the state of South Carolina. STI has held this contract for many years prior to this bid and have acted as a responsive and responsible supplier.

It should also be known that our intent in bidding category 2 was for the Toro Commercial Division products only. Turf Equipment Supply Co. has also bid category 2 with the intent of only supplying the Toro Consumer and Landscape Contractor products as authorized distributors of those products. I believe they have also submitted a letter to you clarifying their intent.

Please consider our request and we look forward to working through this process with you.

Best regards,

Mike Burgess, SCPS
Smith Turf & Irrigation
Sports Fields & Grounds Marketing Mgr
803-280-6906

5/5/2008